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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

LYLE KIRKER, ET AL., *Petitioners,*

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned case on January 28, 1971.

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[1] Lyle Kirker, the Laborers' District Council of Charleston, West Virginia, Vernon R. Gollihugh, George L. Richardson, Robert L. Blevins, Jesse Nance, Gene Fontaine, Chester Dellinger, Robert L. Magee, William H. Smyth, Jr., Homer Golliday, Phillip Didawiek, Okla Burton, George K. Reed, Sr., James Hubert Terry, Joe D. Hines, Delmer Snyder, Howard Whetsell, Carl Heard, Dorland Allen, William M. Thorn, and O. H. Sanders.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 436 F.2d 423, and is reprinted herein as Appendix A, p. 1a, *infra*. The Memorandum Opinion of the United States District Court for the Southern District of West Virginia filed on January 9, 1970, is reported at 308 F. Supp. 615, and is reprinted herein as Appendix C, pp. 3a-20a, *infra*. The Supplemental Opinion of the district court filed on March 16, 1970, is unreported and is reprinted herein as Appendix D, pp. 21a-25a, *infra*. The Judgment of the district court is reprinted herein as Appendix E, pp. 26a-27a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1971; it is reprinted herein as Appendix B, p. 2a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case arose out of the summary discharge by the Governor of West Virginia of approximately 3400 employees of the West Virginia State Road Commission on March 11, 1969, allegedly for having engaged in a work stoppage. This case raises the following questions for review:

1. Whether the due process and equal protection clauses of the Fourteenth Amendment entitled such discharged public employees to an administrative hearing at which they could have presented their claims that their discharge was improperly motivated by political and union animus or was otherwise improper.

2. Whether summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure was improperly granted, dismissing petitioners' complaint which alleged that the employees' discharge was unlawfully motivated by political and union animus and was otherwise improper, in light of (1) the district court's summary denial of petitioners' motions seeking discovery under Rule 34 of the Federal Rules of Civil Procedure; and (2) the existence of evidence in the record sufficient to establish a genuine issue of material fact regarding the motivation for the discharge.

CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS INVOLVED

The constitutional, statutory, and rules provisions involved herein are the First and Fourteenth Amendments to the United States Constitution; Article 3, § 11 and Article 5, § 1 of the Constitution of the State of West Virginia; the Civil Rights Act of 1871, 42 U.S.C. § 1983; Rules 12(f), 34 and 56(c) of the Federal Rules of Civil Procedure; and certain provisions of the West Virginia Code dealing with the State Road Commission and the West Virginia Civil Service System. The foregoing provisions are reprinted as Appendix F, pp. 28a-36a, *infra*.

STATEMENT

Petitioners are twenty former employees of the road maintenance department of the State Road Commission of West Virginia; the Laborers' District Council of Charleston, West Virginia, a labor organization ("Union" hereinafter); and Lyle Kirker, Secretary-Treasurer and Business Manager of the Union ("Kirker" hereinafter) (A. 5-8, 31).[2]

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[2] "A. —" refers to the Appendix filed in the Court of Appeals.

Respondents are Arch A. Moore, Jr., the Governor of West Virginia; William Ritchie, West Virginia State Road Commissioner ("Commissioner" hereinafter); Ted R. Riffle, Cabell County, West Virginia, Supervisor of the Commission; and the West Virginia State Road Commission ("Commission" hereinafter).[3]

The Commission is a public corporation established under § 17-2-1 of the West Virginia Code ("Code" hereinafter) for the purpose of administering and maintaining the State's highways. In March 1969, there were approximately 4,000 employees in the Commission's road maintenance department (A. 85).

Code § 17-2A-2 designates the Commissioner as the Commission's "chief executive officer." He is "in charge of and responsible for the selection, employment and effective organization of all Commission personnel . . ." (Code § 17-2A-4).

Chapter 29 of the Code establishes a State Civil Service System. Pursuant to Code § 17-2A-4, approximately 366 Commission employees hold Civil Service status (A. 138), which protects them against employment discrimination based upon political beliefs or affiliations (Code § 29-6-19), and guarantees that they may not be discharged in the absence of "good cause," a statement of reasons, and an opportunity for a hearing (Code § 29-6-13).

The Commission's road maintenance department employees are not entitled to the safeguards of the Civil

[3] By statutory amendment, effective February 7, 1970, the Commission was renamed "The West Virginia Department of Highways" and the Commissioner was redesignated as "The West Virginia Commissioner of Highways," West Va. Code § 17-2A-1 (1970, c. 68).

Service System (A. 144). However, employees of other State agencies in pay and job classifications comparable to the Commission's road maintenance employees enjoy the protections of the System (R. 463-83).[4]

Although no West Virginia statute establishes the right to union representation for State employees, recognition of unions as representatives of Commission employees has been granted in the past, and similar recognition has been extended to unions by other State agencies (A. 35, 37-63, 91-101).

Between August 24, 1968, and March 1, 1969, the Union engaged in a state-wide organizing campaign among the Commission's road maintenance employees and obtained authorization cards from almost all 4,000 of them (A. 31-2, 85, 171).

According to the Governor and the Commissioner, "prior to the time they took office the employees of the State of West Virginia engaged in road maintenance work have been hired and fired on the basis of the so-called 'Spoils System' of political patronage . . ." (A. 78). And in a political campaign speech delivered in Parsons, West Virginia, on April 13, 1969, the Governor—who was then a non-incumbent candidate in a state-wide gubernatorial primary election—speaking on whether he intended to retain in employment incumbent state office holders and employees, declared:

> [In] every area of the life of our State I have a program. I know what I want to do on November 6, the day after the people of West Virginia submit in final tally the fact that I would be the next Republican Governor of West Virginia. I don't

[4] "R. —" refers to the Record filed in the Court of Appeals.

> need a seeing eye dog to tell me how to get along and we might as well just clear the air; I am on the opposite extreme, perhaps in this thing, but I don't believe I can carry my debt to the party of Lincoln and make it a viable political party ready to do combat with the opposition party by leaving their particular individuals in the jobs of the State. I want to clean 'em out from top to bottom . . . (A. 122-3).

The Governor won the primary and was elected on November 5, 1968 (A. 193). He assumed office on January 13, 1969, and appointed respondent Ritchie as Commissioner on January 31, 1969 (A. 79).

On February 6, 1969, Kirker (on behalf of the Union) met with the Commissioner to discuss Union recognition (A. 32, 138). Kirker told the Commissioner that the Union represented the vast majority of the employees, that it was willing to prove this fact in a mutually agreeable manner, and that it wished to discuss employment conditions at the Commission. The Commissioner refused to engage in any discussions, saying that he desired time to consider the matter further (A. 32). The Union made additional efforts to obtain recognition from the Commission without success. At the same time, the employees were becoming increasingly concerned over rumors of impending wholesale political discharges (A. 33).

On March 3, 1969, in the face of the Commissioner's refusal to recognize the Union or to assure the employees that they were not soon to be fired, many of them commenced a work stoppage (A. 34). Between March 6-11, 1969, the State experienced snow which resulted in adverse road conditions in some parts of the State (A. 117-9). Between March 6-11, 1969, the Commissioner appealed to employees to return to work. How-

ever, at no time were the employees told that failure to report by March 11, 1969, or by any other date, would result in their discharge (A. 129-45).

At a March 11, 1969, press conference, the Governor announced that he was discharging all striking employees, effective immediately (A. 73, 83). He estimated that 3,400 of the 4,000 maintenance employees were affected by his order (A. 85). In reply to a newsman who asked whether "you have any machinery to replace these men," the Governor replied that "[t]he mechanics are in order to replace these individuals" (A. 86). The Governor also assured the press that his action was "not a matter of politics" (A. 85).

Shortly after the Governor's announcement, respondent Riffle, the Commission's newly appointed County Maintenance Supervisor for Cabell County, publicly announced that in order to be hired as a replacement for the dischargees in his district, an applicant was required "to be a Republican" and have "a strong back and a weak mind." Riffle also said that he had already hired 40 qualified replacements (A. 13, 187). In addition, Commission and West Virginia Republican Party officials publicly declared that applications for employment with the Commission were being handled through the Republican Party (A. 115-6, 190-8), and that applicants who did not have Party endorsement "don't receive as much consideration" (A. 188-9). The Commissioner himself stated that in hiring replacements he considered "recommendations by Republican State and County organizations and committee members . . ." and that the Republican State Executive Committee had privately circulated its own applications for Commission employment (A. 214).

PROCEEDINGS IN THE DISTRICT COURT

On March 29, 1969, petitioners filed a class action in the United States District Court for the Southern District of West Virginia on behalf of the dischargees. The district court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343. Petitioners alleged, *inter alia,* that the employees had been wrongfully discharged in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("§ 1983" hereinafter), on the grounds that (a) they had "not been provided with due or proper notice, written specific charges, the opportunity for a hearing, the right to confront their accusor, the right to present a defense as well as all of the other incidents of due process of law to which they are entitled under the . . . Fourteenth Amendment . . ." (A. 11); (b) the discharge violated the First Amendment since it was in retaliation for the employees' association with the Union; and (c) the discharge also violated the First Amendment since it constituted a means of effectuating the "spoils system" of political patronage (A. 9). Petitioners sought, *inter alia,* reinstatement of the employees with back pay and an injunction against future discrimination based upon the employees' political or union affiliations.

On April 14, 1969, respondents filed motions to dismiss for failure to state a claim and for lack of jurisdiction over the subject matter. On May 29, 1969, the Governor and the Commissioner filed an answer in which they alleged, *inter alia,* that the strike and the instant suit constituted efforts on the part of the Union and its officers "to obtain . . . control [over the State] by harassing the [respondents] and their administration" and that these efforts had been preceded by unlawful support by the Union and the West Virginia

State AFL-CIO for the Governor's opponent in the 1968 gubernatorial election (A. 191-5).[5]

All pending motions were heard on August 19, 1969 (A. 205). On August 21, 1969, petitioners moved under F.R.C.P. Rule 34 for the production of documents by respondents (1) relating to the March 11, 1969, discharges; (2) concerning communications between respondents and representatives of the West Virginia Republican Party with respect to Commission employment; and (3) pertaining to employment with the Commission (A. 124-7). These motions were heard on September 12, 1969 (A. 205-6).

On January 12, 1970, the court filed a Memorandum Opinion dismissing petitioners' complaint on the ground that it failed to state a claim and that the court lacked jurisdiction over the subject matter (pp. 3a-20a, *infra*). The court concluded, *inter alia*, that (1) the employees had no right to engage in a strike; (2) the due process and equal protection clauses of the Fourteenth Amendment did not entitle the employees to a hearing; (3) the action was barred by the Eleventh Amendment; and (4) the respondents in their individual capacities enjoyed absolute immunity from damage suits under § 1983.

Respondents thereafter proposed an order which would have granted them summary judgment. In response, petitioners moved for reconsideration of the court's Memorandum Opinion and filed a memorandum opposing respondents' proposed order. Petitioners argued that before the court could convert respondents'

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[5] The district court subsequently ordered these allegations stricken from the answer pursuant to F.R.C.P. Rule 12(f) on the ground that they were "immaterial, impertinent or scandalous" (A. 66-7, 206-7).

motions to dismiss into motions for summary judgment, it was required to so notify petitioners pursuant to F.R.C.P. Rule 12(b). The court thereafter permitted petitioners to file a cross-motion for partial summary judgment and additional affidavits, but it did not pass upon petitioners' motions for discovery. A further hearing was conducted on March 6, 1970.

On March 16, 1970, the court filed a Supplemental Opinion which reaffirmed its earlier opinion (pp. 21a-25a, *infra*). In reply to petitioners' claim that they were "entitled to the production and inspection of the [requested] documents pursuant to their motion under Rule 34 before any final disposition of the motions is made," the court concluded that "[i]n my view of the law applicable to this controversy, the material sought by these motions would not have a relevant bearing on the operative issues in this case . . ." (p. 25a, *infra*).

On March 27, 1970, the court entered an order (1) granting summary judgment to respondents; (2) denying petitioners' cross-motion for partial summary judgment; and (3) denying petitioners' motions for the production of documents (pp. 26a-27a, *infra*).

PROCEEDINGS IN THE COURT OF APPEALS

The Court of Appeals affirmed, *per curiam*, concluding that respondents "were entitled to discharge the plaintiffs for any reason other than for their exercise of constitutionally protected rights, and that there was no requirement that any administrative hearing be held" (p. 1a, *infra*). The Court of Appeals further concluded that the grant of summary judgment to respondents was proper "[i]n the face of the record demonstrating without contradiction that the plain-

'tiffs had refused to perform their duties under conditions of extreme peril to users of the state's highways . . ." and that petitioners' "exhibits and other supporting papers failed to show the existence of any triable issue of fact relating to the reason for their discharge" (p. 1a, *infra*).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with three separate lines of constitutional authority developed by this Court, each of which requires that citizens receive a hearing before they are deprived of certain state-granted privileges such as public employment.

A. The first such line, often described as the "unconstitutional conditions doctrine," declares that citizens may not be penalized with regard to their receipt of public benefits or largesse for having exercised their constitutional rights, and that a hearing is required to consider claims of deprivations of such benefits for constitutionally impermissible reasons. See Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv.L.Rev. 1439 (1968). In the area of public employment, this doctrine is best exemplified by *Slochower* v. *Bd. of Educ.*, 350 U.S. 551 (1956); in which a college professor at a public institution of higher learning was dismissed for exercising his Fifth Amendment privilege against self-incrimination before a congressional committee. In setting aside the discharge this Court declared:

> The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry

here. *We hold that the summary dismissal of appellant violates due process of law* (emphasis added) (350 U.S. 551, 559).

B. This Court also has required a hearing if the interests involved, although not of constitutional dimensions, are so substantial that the absence of a hearing in and of itself becomes constitutionally impermissible.

This principle was recognized and most recently applied in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), in which this Court declared a Wisconsin "posting" law unconstitutional which authorized certain persons, including public officials, without notice or hearing, to prohibit the sale or distribution of alcoholic beverages to designated individuals for one year on the basis of a determination that such individuals had engaged in "excessive drinking of intoxicating liquors":

> [W]here the State attaches a 'badge of infamy' to the citizen, due process comes into play. *Wieman* v. *Updegraff,* 344 U.S. 183, 191 . . . . '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 168 (concurring opinion).
>
> Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential (400 U.S. 433, 437).

Similarly, in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), this Court found that the interest in guaranteeing that welfare recipients are not improperly deprived of their benefits is so substantial as to warrant "an evi-

dentiary hearing *before* the termination of benefits" (397 U.S. 254, 261).

Vital interests which are at least equal to those found to exist in both *Constantineau* and *Goldberg* are present with regard to the discharge of public employees. For the dismissal of public employees for engaging in alleged misconduct serves to "stigmatize their reputation and seriously impair their chance to earn a living . . . ," *United States* v. *Lovett*, 328 U.S. 303, 314 (1946). As recently put by Robert Hampton, Chairman of the United States Civil Service Commission:

> Being fired from the government carries a stigma that prevents many employes from perhaps ever finding gainful employment again. . . . It's not like being fired from the private sector—you just go out and get another job and no one seems to care. But when the government fires you, the private employer is very reluctant to hire you. (*Washington Evening Star*, April 12, 1971, p. A-8).

Moreover, it has been suggested that the economic hardships suffered by discharged public employees leave them not much better off than the terminated welfare recipients in *Goldberg*:

> Few [public employees] earn more than enough to pay their living expenses from month to month, and when their salaries are cut off they may be in the same destitute circumstances as a welfare recipient whose aid has been discontinued. In any event, if there is a difference, it is only a matter of degree. *Ricucci* v. *U.S.*, 425 F.2d 1252, 1257 (Ct. Cl. 1970) (concurring opinion).

The need for a hearing which arises out of the damaging impact of a public employee's discharge is

enhanced in the instant case by the existence of several substantial claims which deserved to be heard since they strongly support the employees' contention that their discharge was improper. Among these claims are the following:

1. That certain discharged employees had not in fact actively participated in the strike,[6] or were absent from work on March 11, 1969, for unrelated reasons;

2. That the mass discharge was improperly motivated by the desire to create patronage jobs for the Governor's political allies. ["We may assume that Rachel Brawner could not have been kept out because she was a Democrat . . . ." *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U.S. 886, 898 (1961)];[7]

3. That the discharges were in retaliation for the employees having joined a union which had opposed the Governor's election. (See *e.g., AFSCME* v. *Woodward,* 406 F.2d 137 (8th Cir. 1967), and *McLaughlin* v. *Tilendis,* 398 F.2d 287 (7th Cir. 1968), which hold that public employees may not be disciplined for exercising their First Amendment right to join a union);

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[6] The Commissioner claimed that it was his policy "to retain in employment, or to restore employment to, persons who, although they had not reported for work on the morning of March 11, 1969, were not in fact actively participating in the strike . . ." and that "on information and belief . . . this policy was carried out by supervisory personnel of the Road Commission" (A. 143). The Commissioner did not indicate how the alleged determinations were made as to which employees "were not actively participating in the strike."

[7] Article 3, § 11 of the West Virginia Constitution expressly provides that "[n]o . . . political test oath shall be required as a prerequisite of qualification to . . . pursue any profession or employment." (p. 28a, *infra*).

4. That since there are no West Virginia statutes, court decisions, or Commission regulations declaring strikes by State employees to be unlawful or setting forth grounds for dismissal or otherwise defining employee misconduct, the employees were not subject to being discharged for participating in a strike. (See *Soglin* v. *Kauffman,* 418 F.2d 163 (7th Cir. 1969), which affirmed the setting aside of discipline imposed on students by a state university on the ground that such discipline was not based on violations of pre-established university rules or standards of conduct);[8]

C. If the discharged employees had been covered under West Virginia's Civil Service laws, as are other similarly situated employees of the State and other Commission employees, they would have been entitled to receive a hearing. Under the West Virginia Civil Service System, covered employees are entitled to notice, a hearing, and judicial review regarding their discharge. In addition, "good cause must exist for the dismissal of an employee in the classified service . . ." which "must be proved in the event of an appeal from the dismissal," *Guine* v. *Civil Service Commission,* 149 W.Va. 461, 467-8, 141 S.E.2d 364 (1965). Further, the Civil Service System expressly protects covered employees from political discrimination.

Therefore, in addition to the right of these employees to a hearing as a matter of procedural due process, their denial of the Civil Service System's protections deprived the employees of the equal protection of the

[8] "The proposition that government officers, including school administrators, must act in accord with rules in meting out discipline is so fundamental that its validity tends to be assumed by courts engaged in assessing the propriety of specific regulations" (418 F.2d 163, 167).

laws. For while a state may not be obliged to establish a civil service system, when it does so it must extend coverage to all similarly situated employees. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities," *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948).

Only a "compelling state interest" can serve to justify the denial of so fundamental a right as that to a hearing. See *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969). But in the instant case, respondents failed to discharge their burden of demonstrating the existence of such a compelling interest, or for that matter, even showing any rational justification for the disparate treatment of the employees herein. Accordingly, it must be concluded that the denial of Civil Service protections to the employees deprived them of the equal protection of the laws.

II. This Court now has two cases before it which demonstrate the existence of a conflict among the circuits regarding the claim that under the Fourteenth Amendment, non-tenured public school teachers who are dismissed or whose contracts are not renewed are entitled to a hearing.

1. In *Perry* v. *Sindermann* (O.T. 1970, No. 952), the Fifth Circuit, 430 F.2d 939 (1970), held that a teacher who claims that the nonrenewal of his contract "is really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong," is entitled to a hearing before an impartial tribunal which "must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition," (430 F.2d 939, 944).

2. On the other hand, in *Drown* v. *Portsmouth School District* (O.T. 1970, No. 1397), the First Circuit, 435

F.2d 1182 (1970), held under similar circumstances that a hearing is not required, but that non-tenured teachers whose contracts are not renewed are entitled to "a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file" (435 F.2d 1182, 1185).

In light of the differing nature of the interests involved, petitioners believe that the employees discharged herein are at least if not more entitled to a hearing as are non-tenured public school teachers. However, petitioners submit that the decision below must be treated as an extension of the existing conflict among the circuits regarding the hearing rights of public employees.

The full scope of the conflict among the circuits,[9] as well as among the district courts and the state courts regarding this issue is described in detail in the Petition for Writ of Certiorari filed in *Drown,* and in the Petition for Writ of Certiorari and Brief in Response to the Petition filed by the National Education Association as *Amicus Curiae* in *Perry.* Accordingly, since a mature conflict exists on this issue, petitioners believe that the simultaneous consideration and disposition of all three cases is warranted.

III. The opinion below is in direct conflict with numerous decisions of this Court concerning the granting

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[9] Court of Appeals decisions which flatly deny the existence of any right to a hearing include *Hodgin* v. *Noland,* 435 F.2d 859 (4th Cir. 1970); *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); *Freeman* v. *Gould Special School Dist.,* 405 F.2d 1153 (8th Cir. 1969), *cert. denied,* 396 U.S. 843 (1969); *Parker* v. *Bd. of Educ.,* 237 F.Supp. 222 (D.Md. 1965), *aff'd,* 348 F.2d 464 (4th Cir. 1965), *cert. denied,* 382 U.S. 1030 (1966).

of summary judgment under F.R.C.P. Rule 56(c). *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962); *Norfolk Monument Co.* v. *Woodlawn,* 394 U.S. 700 (1969); *Askew* v. *Hargrave,* 39 L.W. 4321, 4322 (1971).

Summary judgment may be granted under F.R.C.P. Rule 56(c) only if the pleadings and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." But as petitioners have demonstrated in their Statement, there is sufficient evidence herein to at least establish the existence of a genuine factual issue regarding the true motivation for the discharges. The Governor's overt expressions of hostility toward the Union (A. 191-5), his pre-election promise to resort to mass political discharges if elected (A. 122-3), the partisan statements made during the replacement of the strikers (A. 13, 187), as well as the failure of the Governor to seek an injunction against the strike all clearly suggest that the discharges were improperly motivated.[10]

Hence, in the presence of a genuine factual dispute, it was plain error for the Court of Appeals to affirm the grant of summary judgment herein.

Further, petitioners hoped through discovery to obtain additional evidence which would support their claims. But their motions for the production of documents were denied on the ground that the requested

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[10] [S]ummary procedures should be used sparingly . . . where motive and intent play leading roles . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice'" (*Poller* v. *Columbia Broadcasting System, supra,* at 473).

material "would not have a relevant bearing on the operative issues in this case . . ." p. 25a, *infra*. For the Court of Appeals to have affirmed the denial of petitioners' discovery motions and simultaneously to have dismissed their appeal on the ground that their "exhibits and other supporting papers failed to show the existence of any triable issue of fact," p. 1a, *infra*, is inherently contradictory since it results in penalizing petitioners for failing to establish the existence of certain facts while at the same time denying petitioners access to such facts. *Cf. Amalgamated Clothing Workers* v. *Prepmore Apparel, Inc.* (O.T. 1970, No. 1183), *cert. granted*, 39 L.W. 3418.

IV. This petition should also be granted in light of the substantial number of employees who were adversely affected by the mass discharge. Initially, the Governor estimated he had fired approximately 3,400 employees (A. 85). Respondents later claimed that many of the employees were subsequently rehired (A. 143-4). But respondents concede that no less than 1,752 employees were permanently terminated (A. 144). In addition, the questions raised herein are of direct interest to literally millions of federal, state, county, and municipal employees who are presently uncertain as to whether their constitutional right to due process of law extends to their tenure of public employment. Petitioners submit that the granting of the instant petition will provide this Court with an opportunity to make clear that public employment does not work a forfeiture upon the constitutional right to be heard.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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April 1971

APPENDIX

APPENDIX A

[Caption omitted]

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued January 7, 1971. Decided January 28, 1971.)

Before Haynsworth, Chief Judge, and Boreman and Bryan, Circuit Judges.

Jules Bernstein (Robert J. Connerton, Arthur M. Schiller and James B. McIntyre on brief) for Appellants, and F. Paul Chambers, Special Assistant Attorney General of West Virginia, (Chauncey H. Browning, Jr., Attorney General of West Virginia; John R. Lukens, Louis S. Southworth, II, and Jackson, Kelly, Holt & O'Farrell; and Richard E. Tyson on brief) for Appellees.

PER CURIAM:

The plaintiffs, formerly employees of the West Virginia State Road Commission, contest their discharge by the defendants on March 11, 1969 after they had concertedly refused to work in the face of severe weather conditions persisting over much of the state. They appeal from the district court's order granting summary judgment for the defendants.

For the reasons stated by the district court,* we are persuaded that the defendants were entitled to discharge the plaintiffs for any reason other than for their exercise of constitutionally protected rights, and that there was no requirement that any administrative hearing be held. In the face of the record demonstrating without contradiction that the plaintiffs had refused to perform their duties under conditions of extreme peril to users of the state's highways, we agree that the district court correctly held that their exhibits and other supporting papers failed to show the existence of any triable issue of fact relating to the reason for their discharge. The grant of summary judgment was proper.

Affirmed.

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* Kirker vs. Moore, S.D.W.Va., 308 F.Supp. 615.

APPENDIX B

[Caption omitted]

Judgment

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ Samuel W. Phillips
Clerk

[Filed January 28, 1971, Samuel W. Phillips, Clerk]
A True Copy, Teste: Samuel W. Phillips, Clerk.

By: /s/ Russell W. Riley
Deputy Clerk

APPENDIX C

[Caption omitted]

Memorandum Opinion

This action was instituted by Lyle Kirker in his capacity as Secretary-Treasurer and Business Manager of the Laborers' District Council of Charleston, West Virginia (hereinafter referred to as "Council"), which is a labor organization and a voluntary unincorporated association affiliated with the Laborers' International Union of North America, AFL-CIO, the Council itself, and 20 individual citizens of West Virginia, which individual plaintiffs allege that they bring this action on behalf of themselves and "all of the approximately 3300 employees of the West Virginia State Road Commission who are similarly situated." The defendants are Arch A. Moore, Governor of West Virginia, William S. Ritchie, State Road Commissioner of West Virginia, and Ted R. Riffle, Cabell County Supervisor of the State Road Commission of West Virginia, each in their capacity as public officers and as individuals. Additionally, the State Road Commission of West Virginia is named as a defendant herein.

The complaint alleges that this action arises under the Civil Rights Act of 1871, 42 U.S.C., Section 1983, to redress the deprivation by the defendants, acting under color of the laws of the State of West Virginia, of the rights, privileges and immunities secured and guaranteed to the plaintiffs by the first, fifth and 14th amendments to the Constitution of the United States as well as under the constitution and laws of the State of West Virginia. Jurisdiction is based on 28 U.S.C., Sections 1331 and 1343.

The complaint states that prior to March 11, 1969, the employee-plaintiffs were employed by the State Road Commission of West Virginia and that on that date the defendant, Arch A. Moore, Jr., acting under color of the

laws of the State of West Virginia discharged employee-plaintiffs. The complaint alleges that this action by defendant Moore was in violation of the designated amendments to the Federal Constitution and the constitution and laws of the State of West Virginia in the following respects:

(1) Defendant Moore lacked authority under the constitution and laws of the State of West Virginia to discharge the employee-plaintiffs.

(2) The discharge of the employee-plaintiffs was the result of their union affiliation and activity and as such contravened their rights to petition for redress of grievances and to engage in free speech and association guaranteed to them under the constitutions of the United States and the State of West Virginia.

(3) The discharge of employee-plaintiffs was for the purpose of effectuating the "spoils system" of political patronage in West Virginia, which system violates the designated amendments to the Federal Constitution as well as certain provisions of the constitution of the State of West Virginia.

(4) The refusal of the defendant Ritchie, as State Road Commissioner, to meet and confer with representatives of the employee-plaintiffs relative to the redress of grievances arising out of their employment violated their rights under the designated amendments to the Federal Constitution as well as certain provisions of the constitution of the State of West Virginia.

(5) Plaintiffs were discharged from their employment without proper notice, written specific charges, opportunity for a hearing, right of confrontation and defense and other incidents of due process of law to which they are entitled under the designated amendments to the Federal Constitution and provisions of the constitution of the State of West Virginia.

The complaint seeks relief as follows:

(1) An order setting aside and nullifying the discharge of the employee-plaintiffs from their employment;

(2) Judgment against the defendant Moore and the Commissioner, jointly and severally, in favor of the employee-plaintiffs to reimburse them for their loss of income resulting from their discharge from March 11, 1969, to the date of judgment;

(3) A mandatory injunction requiring defendant Ritchie to meet and confer with plaintiff Kirker, as representative of the employee-plaintiffs, for the purpose of discussing redress of the grievances of the employee-plaintiffs;

(4) An injunction prohibiting the defendants Ritchie and Riffle, together with any other agent or employee of the Commission, from discriminating among employees or applicants for employment of the Commission on the basis of political or union affiliation or activity;

(5) An award of exemplary damages from the defendants, jointly and severally, in the amount of $250,000, together with reasonable attorneys' fees and costs.

Each of the defendants, Moore, Ritchie and Riffle, in their official capacities and as individuals, have filed motions to dismiss this action, and by leave of the Court the defendants, Moore and Ritchie, were also permitted to file their answer to the complaint prior to the Court's disposition of the dismissal motions. The plaintiffs filed a motion for a determination that the action is properly maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and also filed a motion for a preliminary injunction. All of these motions were brought on for hearing and argument on August 19, 1969, and at the conclusion thereof the Court advised counsel that the plaintiffs' motion for a temporary injunction would be denied and that the disposition of the remaining motions would be taken under consideration for disposition.

In response to the joint request of counsel for the parties, the Court directed a letter to them under date of September 13, 1969, setting forth specific findings of fact and conclusions of law relative to the motion for the temporary injunction pursuant to Rule 52(a) F.R.Civ.P. In addition to the pleadings filed by the respective parties, the affidavit of the plaintiff Lyle Kirker, and the affidavit of Oliver W. Singleton, Regional Director for Region VI, AFL-CIO, were filed on behalf of the plaintiffs and the affidavits of Arch A. Moore and William S. Ritchie were filed on behalf of the defendants. In addition thereto, at the hearing on the several motions counsel for the plaintiffs were permitted to file the affidavit of Cecil H. Underwood and counsel for defendants were permitted to file a memorandum dated July 7, 1969, directed to "THE STRIKING STATE ROAD COMMISSION EMPLOYEES" by the plaintiff Kirker. Counsel have also submitted briefs in support of their respective positions on these motions, the final brief having been received on September 22, 1969. To a large degree the facts incident to the disposition of these motions are undisputed, and my rulings thereon will be made based upon the pleadings, affidavits and exhibits to which reference has been made.

Briefly stated, the facts are as follows: The defendant Moore, the nominee of the Republican party, was elected Governor of West Virginia on November 5, 1968, and qualified and began his term of office on January 13, 1969. At the time of Moore's inauguration as Governor, the Legislature of West Virginia had already convened for its constitutional biennial 60-day session and continued in session until midnight on March 8, 1969. The defendant Ritchie was appointed Road Commissioner by Governor Moore effective February 1, 1969, which appointment was subject to confirmation by the Senate of West Virginia and was at the will and pleasure of the Governor.

Prior to the 1968 election, the plaintiff Kirker, as representative of the plaintiff Council, had been engaged in an

organizing campaign to encourage employees of the Road Commission to designate the Council as their representative for the purpose of dealing with the Commission relative to conditions of employment, establishment of seniority rights, protections against wrongful discharge, grievance procedures and other matters customarily falling within the area of the collective bargaining process. In the organizing campaign the Council sought to obtain authorization cards from the employees of the Commission designating the Council as their representative. The authorization card contained the following language:

> "I hereby designate the Laborers District Council of Charleston, W. Va. to represent me for the purpose of collective bargaining and in any and all other situations that may arise under the operation of the National Labor Relations Act and/or with any individual employer where the provisions of the National Labor Relations Act are not invoked."

Between August 24, 1968, and March 1, 1969, approximately 4,000 employees of the Commission signed such authorization cards.

Shortly after his appointment as Road Commissioner, Ritchie received a call from Don Smith, a representative of the Laborers' International Union of North America, AFL-CIO, who requested an appointment for himself and Kirker. Pursuant thereto, Ritchie met with Smith and Kirker on February 6, 1969, and at that time Kirker advised Ritchie that the Council represented a substantial majority of the Commission employees and desired to discuss with the Commission the terms and conditions of employment of the employees which it represented. Ritchie was of the opinion that Kirker desired to obtain a collective bargaining agreement between the Commission and the Council concerning the terms and conditions of employment of the employees of the Commission, and advised Kirker that since he, Ritchie, had only recently under-

taken his duties as Commissioner, he desired additional time to consider the matter and discuss it with Governor Moore.

Thereafter on February 10, 1969, Kirker wrote Ritchie advising him that since the meeting on February 6, he had been besieged by calls from State Road employees to the effect that large scale replacements were to take place on Monday, February 17. In his letter Kirker acknowledged that on October 30, 1968, Moore had indicated that he did not anticipate discharging jobholders merely for political expediency, but that despite such statements the fear of discharge persisted among the Commission employees. Following receipt of this letter, Ritchie in a conversation with Kirker advised him that he did not intend to make any large scale replacement of Commission employees and that the "fears" to which Kirker referred in his letter were, in fact, unfounded. Ritchie continued to advise Kirker that he had brought the subject to the attention of Governor Moore and that it was under continued study.

On February 24, 1969, Kirker advised Ritchie that the employees of the Commission were becoming increasingly concerned about their job security as well as other grievances and that a walkout might be imminent. Ritchie stated that the question was being considered by him and Governor Moore, but when Kirker heard nothing further from Ritchie, as stated in Kirker's affidavit, "* * * on March 3, 1969, in the face of the failure of the Commission to recognize the Council as their representative, many of the employees of the Commission engaged in a refusal to work and went on strike." Thereafter on March 5, 1969, Kirker asked Ritchie to meet and discuss the situation, but later that day was advised by Ritchie that no meeting would be held.

On March 6, 1969, hazardous road conditions were developing in sections of the State as the result of snow

and ice on the highways and by that evening vehicular travel was extremely dangerous. Ritchie, as Road Commissioner, issued a statement through the various communication media in which he stated his concern about the condition of the highways and asked all Road Commission emergency snow crews to report to work immediately in their various counties and proceed with the work of clearing the highways for the safety and protection of the travelling public. This request had gone to the District headquarters and to the County headquarters of the Road Commission. Employees in several Counties responded to the appeal but maintenance operations remained halted in the great majority of the Counties.

On the morning of March 10, 1969, fresh snow fell over much of the State and due to low temperatures on the evening of that day and the early morning of March 11, many of the highways were covered by ice. Further snow on March 11 compounded the hazardous highway conditions.

The Road Commission had made another appeal to the Road Commission employees asking that they report for work to clear the highways and relieve the emergency conditions, but received no substantial response thereto, and on the morning of March 11, 1969, Ritchie advised Governor Moore that he had concluded that the employees who were actively participating in the strike should be replaced so that action could be taken to clear the highways. Governor Moore concurred in the recommendation and at noon on March 11, held a press conference at which he made a statement with respect to the situation. The statement in its entirety is appended as an exhibit to the answer of the defendants, and reads in part as follows:

> "* * * continuing snow in the State of West Virginia has added to the perilous conditions of the roads of the state, and the situation has now reached a critical point. As your Governor, it is up to me to

act to protect the health and safety, and the welfare of the citizens of this state and to do everything I can to see that the citizens and the economy of the state do not suffer further family losses or economic setbacks. For these reasons, and in support of my Road Commissioner with whom I have been in constant touch since the unprecedented action of the Road Commission employees, and who has labored long and hard in an effort to meet these problems, I am ordering the immediate discharge of all Road Commission employees who are off their jobs at this moment. This action is taken with the firm and widespread belief that a strike by employees of State Government is illegal in the first instance, but more importantly, the situation can no longer be tolerated.

* * * Our highways must be cleared of snow and ice and made safe for the traveling public. * * * it is my responsibility to see that every essential state service is made available to all of the citizens of this entire state. * * * Now we're presently confronted with additional forecasts of snow on top of the already hazardous conditions. And this, in my judgment, makes it necessary for me to see that immediate work be undertaken on all the highways of the state."

Attached as an exhibit to the affidavit of the plaintiff Kirker is a list of the names of the persons from whom the Council obtained cards of authorization to be their collective bargaining representative. The exhibit contains the names of 3,843 individuals and an analysis of the names on the list made by the staff of the Road Commissioner on or about May 1, 1969, reflects as follows:

(1) 19 of the individuals were dismissed prior to March 3, 1969.

(2) 28 of the individuals have retired.

(3) 12 of the individuals are deceased.

(4) 319 of the individuals have voluntarily resigned their employment.

(5) 11 of the individuals are not employees of the Road Commission.

(6) 50 of the individuals were dismissed incident to the strike, were subsequently rehired, and have since voluntarily resigned their employment.

(7) 119 of the names could not be found in the Commission records.

(8) 1,532 of the individuals were still employed by the Commission which number includes employees who were discharged on March 11 but thereafter rehired.

(9) 1,752 of the individuals who were discharged on March 11 have not been re-employed by the Commission.

This analysis by the Road Commission staff does not appear to be controverted by counsel for the plaintiffs.

In their several motions the defendants asked the Court to dismiss this action upon the grounds that the complaint fails to state a claim upon which relief can be granted and that this Court lacks jurisdiction of the subject matter. The reasons assigned in support of the motions are: (1) the employee-plaintiffs were discharged from their employment with the Road Commission for their willful refusal to perform services on the highways of the State at a time when such services were necessary for the health, safety and welfare of the citizens of the State; (2) the complaint fails to delineate any rights of the plaintiffs allegedly violated by the defendants which are secured and guaranteed to the plaintiffs by the laws or Constitution of the United States; (3) the defendants are immune from this suit; (4) there is no diversity of citizenship between the parties litigant nor claims arising

under the Constitution or laws of the United States which would support jurisdiction in this Court; and (5) the alleged grounds of federal jurisdiction are frivolous and unconstitutional and accordingly would not support jurisdiction in this Court under the theory of pendent jurisdiction.

The plaintiffs have advanced a multiplicity of arguments in opposition to the dismissal motions. However, it is clear that the primary and, indeed, the dispositive issue is whether the plaintiffs had a right to engage in a strike against the State of West Virginia under either federal or state law.

While several federal appellate courts have recently indicated that the right of public employees to belong to a labor union falls within the constitutional protection of the first and 14th amendments, none of them sanctions nor suggests that the right to strike or even the right to obtain a collective bargaining agreement from the sovereign falls within the ambit of federal constitutional protection. See *Atkins* v. *City of Charlotte,* 296 F. Supp. 1068 (W.D.N.C. 1969). This traditional prohibition against the assertion of the right to strike against the federal government was articulated by Chief Justice Warren in *Amell* v. *United States,* 384 U.S. 158, when he observed (at 161):

> "By virtue of their governmental employment, the petitioners' right to join unions and to select bargaining representatives unlike that of private seamen, exists only by express leave of the President, Exec. Order No. 10988, 27 Fed. Reg. 551 (1962), and they are forbidden, under pain of discharge, fine and imprisonment, from exercising or asserting the right to strike, * * *."

The Congress of the United States recognized this principle when it specifically excluded employees of the

federal government, states and political subdivisions from the legislation which gave employees the right to organize, bargain collectively and engage in strikes and other concerted union activities. *Labor-Management Relations Act,* 29 U.S.C.A. § 152(2) and (3). The distinction between employment in the private sector of the economy and employment by the government was also judicially noted in *United States* v. *Mine Workers,* 330 U.S. 258 (1947), the Court stating (at 289):

> "We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."

In *Atkins* v. *City of Charlotte, supra,* the Court recognized the constitutional right of public employees to join a labor union, but specifically declined to countenance their right to strike. Judge Craven, speaking for the Court, stated (296 F. Supp. at 1076):

> "The thought of fires raging out of control in Charlotte while firemen, out on strike Neroicly watch the flames is frightening. We do not question the power of the State to deal with such a contingency."

On this issue the plaintiffs fare no better under West Virginia law than they do under pronouncements in the federal area. The opinions of several Attorneys General of this State have consistently stated that public employees in West Virginia have neither the right of collective bargaining nor the right to strike. See opinion of the Attorney General, Vol. 49, pages 448 and 452, and Vol. 51, page 683. Plaintiffs, however, argue that since there is no express legislative proscription in West Virginia against strikes by public employees and no decisional

law by our Supreme Court of Appeals on this point, we are confronted with a situation analagous to the application of the *Erie* doctrine in diversity cases; that in the absence of an applicable statute or judicial precedent it is an "open" question and "may be resolved for the first time" by this court.

The answer to this somewhat novel argument is to be found in Article 8, Section 21 of the West Virginia Constitution which makes the "common law" the law of this State except as changed by the State Constitution and Acts of the Legislature. It is axiomatic that a strike by public employees for any purpose is illegal under the common law, and no statutory declaration of their illegality is necessary. In considering this question for the first time in the case of *Board of Education* v. *Redding*, 207 N.E.2d 427 (Ill. 1965), the Supreme Court of Illinois made this observation (207 N.E.2d at 430):

> "Although this is a case of first impression in a reviewing court of this jurisdiction, it is, so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal."

The rationale of this principle of the common law was bluntly stated in *City of Cleveland* v. *Division 268, etc.*, 90 N.E.2d 711 (Ohio 1949), " * * * a strike against the public, a strike of public employees, has been denominated * * *, as a rebellion against government."

Through the years, not only the courts but statesmen and commentators have stated that to permit a strike by public employees at any level is inconsistent with the orderly processes and sovereignty of government:

> "Under our system, the government is established by and run for all of the people, not for the benefit

of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle. It has been so regarded by the heads of the executive departments of the states and the nation. Most of the text writers refer to one or more of the following statements by three of our recent presidents. They are quoted, for example, in 1 Labor Law Journal 612 (May, 1950): 'There is no right to strike against public safety by anybody anywhere at any time' (Calvin Coolidge on the Boston police strike). This same strike was characterized by President Wilson as 'an intolerable crime against civilization.' President Franklin D. Roosevelt said in a letter to the president of the National Federation of Federal Employees on August 16, 1937: 'Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. * * * [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.' As the author of the article cited says, 'The above statement by President Roosevelt, who certainly was no enemy of labor unions, epitomizes the answer to the problem. It seems to be axiomatic.'

"The commentators, generally, subscribe to this proposition. National Institute of Municipal Law Officers Reports No. 76, 116, 129; 1 Teller, Labor Disputes & Collective Bargaining (1947 Sup.) § 171;

18 N.Y.U.L.Q. Rev. 247; 94 U. of Pa. L. Rev. 427." *Norwalk Teachers' Assn.* v. *Board of Education,* 83 A.2d 482 at 484 (Conn. 1951).

When the plaintiffs and other employees of the Road Commission initiated their work stoppage on March 3, 1969, they were engaged in an illegal strike against the sovereign State of West Virginia and they continued in that posture up to the date of their discharge on March 11, 1969. Under these circumstances, the Governor and the State Road Commissioner had the right, if not indeed the responsibility, to terminate the plaintiffs' employment with the State. This action by the defendants, Moore and Ritchie, not only comported with the law of the State, but it violated no federal constitutional rights of the employees so discharged.

The plaintiffs argue that the Governor exceeded his authority when he discharged the Road Commission employees since Chapter 17, Article 2A, Section 4, of the West Virginia Code places responsibility for employment of Commission personnel upon the State Road Commissioner. Section 5 of Article VII of the State Constitution vests the chief executive power in the Governor and Section 18 of the same Article requires all officers of the Executive Department to keep the Governor advised of their activities. The Road Commissioner serves at the will and pleasure of the Governor and the record clearly shows that the decision to discharge the plaintiff-employees was reached after the Governor and Commissioner Ritchie had conferred about the gravity of the situation. Under these circumstances what possible difference should it make that the public announcement of the discharge was made by the Governor instead of the Commissioner—the answer obviously is none.

The plaintiffs further contend that their discharge was effected in disregard of their rights of procedural due

process, including the right of formal notice and a hearing upon the reasons for termination of their employment. On the facts here present this contention is patently lacking in merit. The plaintiffs and other striking employees were absent from their jobs, refused to return to work and well knew when and for what reason they were fired. Under these circumstances if the plaintiffs had any rights to procedural due process, they forfeited such rights through their own misconduct. Years ago in *Moyer* v. *Peabody,* 212 U.S. 78 (1909), Mr. Justice Holmes said "* * * it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." Assuredly, the formalities of procedural due process were neither appropriate nor practicable in the light of the situation which existed in West Virginia on March 11, 1969.

Additionally, however, the plaintiffs' employment by the State was not "property" and was not protected by the due process clause. This principle has been uniformly recognized by the courts. See *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U.S. 886 (1961); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Jenson* v. *Olsen,* 353 F.2d 825 (8th Cir. 1965); and *Bailey* v. *Richardson,* 182 F.2d 46 (D.C. Cir. 1950). In the last cited case the Court stated (182 F.2d at 58):

> "No function is more completely internal to a branch of government than the selection and retention or dismissal of its employees. * * *
>
> "In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would process be? To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting

> ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right."

The plaintiffs were employed in a classification which was not covered by the West Virginia Civil Service Act and accordingly they had no job tenure under the law of this State. Their argument that this exclusion from the Civil Service statute violates the equal protection clause of the 14th amendment has been rejected in a number of cases. See *Ricks* v. *Department of State Civil Service*, 8 So.2d 49 (La. 1942); *State ex rel, McKittrick* v. *Kirby*, 163 S.W.2d 990 (Mo. 1946) and *Shelby* v. *City of Pensacola*, 151 So. 53 (Fla. 1933). The exclusion of the plaintiffs' job classifications from Civil Service coverage involved no invidious discrimination but was the result of legislative choice. In this context the Court in the *Shelby* case observed:

> "[T]here is nothing in either the state or Federal Constitutions to make a discrimination of this kind violative of the organic law, however unfair and unjust as it may be as a legislative policy."

In addition to the foregoing, it would appear that the plaintiffs in this case are confronted by the insuperable barrier of the 11th amendment since it is now well settled that under the amendment a state is immune from suit in a federal court by its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1. Whether the action is a suit against a state within the meaning of the amendment is to be determined by the character of the proceeding and the relief sought rather than the mere names of the titular parties to the litigation. *Ex parte New York*, 256 U.S. 490; *Louisiana* v. *Jumel*, 107 U.S. 711.

In the complaint in this case the plaintiffs ask to be reinstated as employees of the State; a money judgment for loss of income; a mandatory injunction requiring the

Road Commissioner to consider their grievances as employees of the State; and an injunction against certain alleged discriminatory State employment practices. The thrust of the relief sought is directed at the State of West Virginia and could be granted only by requiring the nominal defendants, as officers of the State, to take affirmative action to provide such relief. Thus it is clear that the State is the real party in interest and the 11th amendment immunity bars any consideration of the complaint in this court. The law relative to the State's immunity in such a case was clearly stated in *Hagood* v. *Southern*, 117 U.S. 52, at 67:

> "Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the XIth amendment to the Constitution of the United States, * * *.
>
> "The case comes thus directly within the authority of *Louisiana* v. *Jumel*, 107 U.S. 711."

The Supreme Court has made it clear that it is cases such as the present one where the relief requested will require affirmative action by the sovereign that fall within the jurisdictional prohibition of the 11th amendment. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Pennoyer* v. *McConnaughy*, 140 U.S. 1; *North Carolina* v. *Temple*, 134 U.S. 22; *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959).

Finally, in regard to the alleged liability of the defendants in their individual capacity for damages in an action under 42 U.S.C. 1983, the recent Fifth Circuit opinion in *Martone* v. *McKeithen,* —— Fed.2d —— (1969) stated the law clearly and succinctly:

> "A. The Governor of the State has immunity from damage suits for acts within the sphere of executive activity. Barr v. Matteo, 1959, 360 U.S. 564, 79 S. Ct. 1335, 3 L.Ed.2d 1434; Gregoire v. Biddle, 2 Cir. 1949, 177 F.2d 579; Norton v. McShane, 5 Cir. 1964, 332 F.2d 855. As Judge Learned Hand said in Gregoire v. Biddle, 177 F.2d at 851: 'The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

In the light of the foregoing observations, it is my conclusion that the complaint herein fails to state a claim against the defendants, either individually or in their respective official capacities, upon which relief could appropriately be granted, and I further conclude that this Court lacks jurisdiction of the subject matter. Accordingly, the several motions will be granted and counsel may prepare an appropriate order, incorporating this opinion by reference therein.

JOHN A. FIELD, JR.
United States District Judge

Dated January 9, 1970

APPENDIX D

[Caption omitted]

Supplemental Opinion

This opinion supplements my memorandum opinion which was filed in this action on January 12, 1970. In that opinion I concluded that the complaint herein should be dismissed for failure to state a claim upon which relief could be granted, and for the additional reason that this Court lacks jurisdiction of the subject matter. After the memorandum opinion had been filed, counsel were unable to agree upon an appropriate order. Counsel for the defendants took the position that since the Court based its decision on the dismissal motion not only on the pleadings, but also upon certain affidavits and exhibits which had been filed herein, an order of summary judgment in favor of the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure was appropriate and required under Rule 12(b) of the Federal Rules. Counsel for the plaintiffs, of course, challenged this contention of the defendants and on January 21, 1970, filed a motion for reconsideration of the memorandum opinion and in opposition to the proposed order tendered by the defendants.

Counsel for plaintiffs contend that they had no indication from the Court of any intention to convert the dismissal motions of the defendants into a motion for summary judgment, and under the circumstances, suggest summary disposition at this juncture would be improper. In support of their position they cite the Fifth Circuit decision in *Georgia Southern and Florida Railway Co.* v. *Atlantic Coast Line Railroad Co.*, 373 F.2d 493 (1967). While it is true that I did not specify that the motions were being treated as summary in nature, I do not believe that the factual situation here is analogous to that confronting the Court in the *Georgia Southern* case.

To a large degree, the procedural background of the present case was delineated in my memorandum opinion but for clarification will be briefly reviewed herein. Upon the filing of the complaint each of the defendants, in his official capacity and as an individual, filed motions to dismiss this action, and by leave of the Court the defendants, Moore and Ritchie, were also permitted to file their answers to the complaint prior to the disposition of the dismissal motions. The plaintiffs filed a motion for a determination that the action was properly maintainable as a class action pursuant to Rule 23 and also filed a motion for a preliminary injunction. All of these motions were brought on for hearing and argument on August 19, 1969, and at the conclusion thereof, I denied the plaintiffs' motion for a temporary injunction and advised counsel that the remaining motions would be taken under consideration for disposition. As pointed out in my memorandum opinion, the plaintiffs had filed affidavits of Lyle Kirker and Oliver W. Singleton and the defendants had filed affidavits of Arch A. Moore, Jr., and William S. Ritchie. At the hearing, the plaintiffs were permitted to file the affidavit of Cecil H. Underwood and defendants were permitted to file a certain memorandum referred to in my opinion. Under date of August 25, 1969, I directed a letter to counsel pointing out that the affidavits of Moore and Ritchie, together with certain exhibits, had been appended to the defendants' memorandum filed by counsel, and that it occurred to me that in order that these affidavits be properly a part of the record, they should be submitted for filing independently of the memorandum. I further pointed out that I assumed counsel for plaintiffs would have no objection inasmuch as they were advised of the content of these affidavits in advance of the hearing and that much of the material therein was covered during the course of argument on the motions. Responsive to this letter, the affidavits were filed by order entered on September 9, 1969, which order was approved for entry by counsel for both the plaintiffs and the defendants.

Two days after the hearing on the motions, counsel for the plaintiffs on August 21, 1969, filed a motion for the production of certain documents under Rule 34, which motion was brought on for hearing on September 12, 1969. At the hearing on that later date I made a prefatory statement to counsel covering the subject matter of my letter of August 25 and pointing out that the affidavits of Moore and Ritchie had been filed as a part of the record by the order above referred to and that this apparently was agreeable to the plaintiffs. I then inquired whether I was correct in my recollection "* * * that the three motions were submitted upon the record as it stood at that time * * *?" to which counsel replied that this recollection was accurate.

In the light of the foregoing procedural history, I am not at all persuaded that counsel for plaintiffs were "mousetrapped" in any fashion comparable to the situation in the *Georgia Southern* case, and it occurs to me that under the circumstances Rule 12(b) would require that my dismissal under ground (6) of the Rule would, of necessity, be summary in its nature. I have, out of an abundance of caution, permitted counsel for the plaintiffs to file any additional material bearing on the motions and certain affidavits and exhibits were filed on February 24, 1970. Additionally, on that date plaintiffs filed a cross-motion for summary judgment. This motion was accompanied by a memorandum in support thereof and also in opposition to the granting of summary judgment to the defendants, and the request of the plaintiffs that the memorandum opinion be reconsidered. Thereafter, a hearing was held on these motions on March 6, 1970.

A review of the material filed on February 24, 1970, discloses that to a large degree it is merely cumulative to the exhibits and affidavits filed on behalf of the plaintiffs prior to my consideration of the dismissal motions. The only novel material submitted is an exhibit attached to the affidavit of Mr. Bernstein, one of the counsel for the plain-

tiffs. This exhibit is that portion of the original answer filed by the defendants which had been designated therein as the "Fifth Defense" and which was ordered stricken from the answer by the Court upon the motion of the plaintiffs. The subject matter of this "Fifth Defense" was to a large degree a delineation of a political controversy which allegedly existed between the defendant Moore and the head of the AFL-CIO Union in West Virginia. Counsel for plaintiffs suggest that returning this material to the record via the affidavit of Mr. Bernstein is appropriate for the purpose of demonstrating the motivation of the defendant Moore relative to the subject matter of this litigation.

I find nothing whatsoever in the supplemental material filed by the plaintiffs which would justify or require any conclusions different from those stated in my original Memorandum Opinion, and it would serve no useful purpose to once again review the authorities which I feel support those conclusions.

Counsel for plaintiffs contend that they are entitled to the production and inspection of the documents pursuant to their motion under Rule 34 before any final disposition of the motions is made. These motions for production are directed to the State Road Commission, to the defendant, Arch A. Moore, Jr., to the defendant, William S. Ritchie, and to the defendant, Ted R. Riffle, and seek all books, records, correspondence, memoranda, minutes and other documents relating to the employment of individuals by the Road Commission from November 5, 1968, to the date of the motions, including but not limited to employment records, applications for employment and letters of reference and recommendation. The motions further seek similarly described records relative to communications between defendants and representatives of the Republican party of West Virginia, as well as records of the same nature relative to the discharge of approximately 3300 employees of

the Road Commission on March 11, 1969. In my view of the law applicable to this controversy, the material sought by these motions would not have a relevant bearing on the operative issues in this case, and under the circumstances, I can perceive no useful purpose in requiring the defendants to engage in the monumental undertaking which would be required to respond to these motions.

Accordingly, upon consideration of the pleadings, motions, affidavits and exhibits, including the affidavits and exhibits filed by the plaintiffs on February 24, 1970, I rule as follows:

(1) A motion for summary judgment should be entered in favor of the defendants pursuant to Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure for the reasons stated in my Memorandum Opinion filed on January 12, 1970.

(2) The cross-motion of the plaintiffs for partial summary judgment is denied.

(3) The motions of the plaintiffs for production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure directed to the State Road Commission, Arch A. Moore, Jr., William S. Ritchie and Ted R. Riffle are denied.

(4) The plaintiffs' motion for reconsideration of the Memorandum Opinion heretofore filed in this action is denied.

Counsel are directed to prepare an appropriate order incorporating the Memorandum Opinion filed on January 12, 1970, as well as this Supplemental Opinion by reference therein.

JOHN A. FIELD, JR.
United States District Judge

Dated March 16, 1970

APPENDIX E

[Caption omitted]

Order

This cause came on to be heard upon the pleadings filed herein, upon the plaintiffs' motion for a preliminary injunction, upon the plaintiffs' motion for production of documents, upon the several motions to dismiss of each of the defendants herein, upon the affidavits, exhibits and documents outside of the pleadings referred to and described in the letter Memorandum Opinion of the Court dated January 9, 1970, later made a part hereof by reference, upon plaintiffs' cross-motion for partial summary judgment, upon plaintiffs' motion for reconsideration of the Memorandum Opinion, upon the affidavits, exhibits and documents outside of the pleadings referred to and described in the letter Supplemental Opinion of the Court dated March 16, 1970, later made a part hereof by reference, and upon oral argument and briefs submitted by the parties.

It appears to the Court and the Court does find that there is no genuine issue as to any material fact and that the defendants herein, in both their official and individual capacities, are entitled to judgment as a matter of law. It is accordingly ORDERED, ADJUDGED and DECREED that:

(1) Summary Judgment be and the same hereby is entered in favor of the defendants herein, in both their official and individual capacities, pursuant to Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure;

(2) The plaintiffs' cross-motion for partial summary judgment be and the same hereby is denied;

(3) The plaintiffs' motions for the production of documents be and the same hereby are denied; and

(4) The plaintiffs' motion for reconsideration of the Memorandum Opinion dated January 9, 1970, be and the same hereby is denied;

all for the reasons set forth in the letter Memorandum Opinion of this Court dated January 9, 1970, and the letter Supplemental Memorandum of this Court dated March 16, 1970, copies of which are attached hereto, and which letter opinions are incorporated herein by reference, and, it is further ORDERED that said letter opinions dated January 9, 1970, and March 16, 1970, be and the same are hereby made a part of the record in this action.

To which actions and rulings of the Court the plaintiffs by their counsel object and except.

ENTER this 27th day of March, 1970.

JOHN A. FIELD, JR.
District Judge

INSPECTED BY:
JAMES B. MCINTYRE
Counsel for Plaintiffs

PRESENTED BY:
CHAUNCEY H. BROWNING, JR.
Attorney General of West Virginia

By F. PAUL CHAMBERS
Special Assistant Attorney General

F. PAUL CHAMBERS
Counsel for Defendants

APPENDIX F

Constitutional, Statutory and Rules Provisions Involved

United States Constitution

* * *

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Constitution of the State of West Virginia

* * *

Article 3, § 11. Political tests, requiring persons, as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths, of past alleged offenses, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment. Nor shall any

person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law.

* * *

Article 5, § 1. The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

* * *

United States Code

* * *

28 U.S.C. § 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

* * *

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Federal Rules of Civil Procedure

* * *

Rule 12

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order striken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

* * *

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing [Prior to 1970 Revision]

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

* * *

Rule 56. Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone

although there is a genuine issue as to the amount of damages.

* * *

West Virginia Code

* * *

State Road Commission

§ 17-2-1. The State road commission of West Virginia, heretofore created and existing as a corporation, shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings; and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes.

* * *

§ 17-2A-2. The commissioner shall be a person who is experienced in highway planning, finance, construction, maintenance, management and supervision qualifying him for the duties of his office; shall devote his full time and attention to his official duties and responsibilities; shall reside at and maintain his office headquarters at the State capital; shall be the chief executive officer of the commission and, subject to other provisions of law, shall have direct and full control, management and supervision of the entire State road program and system; and shall, prior to assumption of the duties of his office, take and subscribe to the oath prescribed by the Constitution and execute a bond, with surety approved by the commission, in the penal sum of twenty-five thousand dollars, which executed oath and bond shall be filed with the secretary of state. Premiums on the commissioner's bond shall be paid from commission funds.

* * *

§ 17-2A-4. The commissioner shall be in charge of and responsible for the selection, employment and effective or-

ganization of all commission personnel for the entire State road and highway program. He may establish such divisions, sections and other functional and organizational units within the commission as may be necessary and practical in the full and effective discharge of the duties and responsibilities of his office. Except as otherwise provided by law, all commission personnel shall be classified pursuant to the job classification system and shall be paid pursuant to the salary scale established by the commissioner.

* * *

§ 17-2A-8. In addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

* * *

(24) Make and promulgate rules and regulations for the government and conduct of personnel, for the orderly and efficient administration and supervision of the State road program and for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him by law;

* * *

Civil Service System

* * *

§ 29-6-1. The general purpose of this article is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation and welfare of its civil employees, and other incidents of State employment. All appointments and promotions to positions in the State service shall be made solely on the basis of merit and fitness, except as hereinafter specified.

§ 29-6-2. (a) The classified service to which this law shall apply shall comprise all positions covered by the present

merit system at the effective date of this article [July 1, 1961] and the following positions in the State tax commission and the public service commission: Procurement officer; supervisor of field deputies; supervisor, supervisor I and field auditors of the cigarettes, soft drinks, general license and store license division; supervisor and field auditors of the accounting division; supervisor and research analysts of the public utility division; supervisor of the assessment and levy division; supervisor of the cashier's division; supervisor, senior accountant and auditors of the consumers sales tax division; the supervisor, assistant supervisor and auditors of the gasoline excise division; supervisor and assistant division director of the inheritance tax division; supervisor, revenue examiners and field auditors of the business and occupation tax division; supervisor and field appraisers of the property evaluation division; the supervisor of the property evaluation assessment and equalization division; supervisor of the tabulation division; chief and assistant chief of the rate and tariff department; chief accountant, assistant chief accountant, and senior accountants of the accounting department; chief engineer, senior engineers, senior gasoline engineers, senior electrical engineers and staff engineers of the engineering department; and assistant director and rate analysts of the motor carrier department.

The governor may, by executive order, with the written consent of the civil service commission and the appointing authority concerned, add to the list of positions in the classified service, but such additions shall not include the following:

(1) The State legislature and other officers elected by popular vote and persons appointed to fill vacancies in elective offices.

(2) Members of boards and commissions and heads of departments appointed by the governor or such heads of departments selected by commissions or boards when expressly exempt by law or board order.

(3) One principal assistant or deputy and one private secretary for each board or commission or head of a department elected or appointed by the governor or legislature, other than the civil service commission and the director of personnel.

(4) Not more than fifteen employees in the office of the governor.

(5) Judges, referees, receivers, jurors and notaries public.

(6) The secretaries and clerks of each judge of a court of record.

(7) Patients or inmates employed in State institutions.

(8) Persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation or examination on behalf of the legislature or a committee thereof, an executive department or by authority of the governor.

(9) All employees assigned to the executive mansion.

(10) Janitors and laborers employed by any agency.

(11) Managers and clerks of liquor stores.

(12) Superintendent, county maintenance of roads, and all personnel under his supervision.

(13) Part-time professional personnel engaged in professional services without administrative duties and personnel employed for less than ninety working days a year.

(14) All clerical employees who are not under the present merit system and whose jobs do not require special knowledge or skill and training in the operation of business machines.

All excepted positions to be termed unclassified service.

Nothing herein shall be construed as precluding the appointing authorities from filling any position in the manner in which positions in the classified service are filled.

* * *

§ 29-6-13. Any employee in the classified service who is dismissed or demoted after completing his probationary period of service or who is suspended for more than thirty days in any one year, may, within thirty days after such dismissal, demotion or suspension, appeal to the commission for review thereof. Upon such review, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard publicly and to present evidentiary facts. At the hearing of such appeals, technical rules of evidence shall not apply. If the commission finds that the action complained of was taken by the appointing authority without good cause, the employee shall be reinstated to his former position or a position of like status and pay, without loss of pay for the period of his suspension. When any employee is dismissed and not reinstated after such appeal, the commission in its discretion may direct that his name be placed on an appropriate re-employment list, for employment in any similar position other than the one from which he has been removed. Any final action or decision taken or made hereunder shall be subject to review by the supreme court of appeals, if appeal is made within sixty days of the action or decision complained of.

• • •

§ 29-6-19. (a) No person shall be appointed or promoted to, or demoted or dismissed from any position in the classified service or in any way favored or discriminated against with respect to such employment because of his political or religious opinions or affiliations or race; but nothing herein shall be construed as precluding the dismissal of any employee who may be engaged in subversive activities or found disloyal to the nation.

• • •

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Supreme Court, U.S.
FILED
JUN 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

LYLE KIRKER, ET AL., *Petitioners*,

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1646

LYLE KIRKER, ET AL., *Petitioners,*

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

For convenience, parties will be referred to as follows:

Petitioner Laborers' District Council ("Union")

Petitioner Lyle Kirker ("Kirker")

The twenty other individual petitioners ("Petitioner-Employees")

Respondent Arch A. Moore, Jr., as Governor of West Virginia and individually ("Governor Moore")

Respondent William S. Ritchie as Road Commissioner of West Virginia and individually ("Commissioner Ritchie")

Respondent Ted R. Riffle, as Cabell County Supervisor of the Road Commission and individually ("Riffle")[1]

Respondent, The State Road Commission of West Virginia ("Commission")[2]

References to the Petition for a Writ of Certiorari are designated ("P. Br. ___"), and to its appendix as ("P. Br. A.___")

References to the Appendix are designated ("A. ___")

References to the Unprinted Record are designated ("R. ___")

The facts hereafter stated, except when otherwise expressly noted, are not, in the judgment of counsel for Respondents, in issue in the record before this Court.

Governor Moore was elected Governor of West Virginia on November 5, 1968. He qualified and began his term of office on January 13, 1969. Commissioner Ritchie was appointed State Road Commissioner effective February 1, 1969. (A. 79, 137) Commissioner Ritchie holds has office at the "will and pleasure" of the Governor pursuant to Ch. 6, Art. 7, Sec. 2a of the Code of West Virginia, as amended.

The West Virginia Legislature convened in Regular Session on the second Wednesday in January, 1969 (W. Va. Constitution Article VI, § 18).

On or about February 6, 1969, (A. 32, 138) at the request of Kirker, Commissioner Ritchie met with Kirker,

---

[1]Riffle ceased to be Cabell County Supervisor on August 19, 1969 (A. 212).

[2]By Ch. 68 of the Acts of the West Virginia Legislature, Regular Session 1970, the State Road Commission became the West Virginia Department of Highways and the Road Commissioner became the West Virginia Commissioner of Highways.

Kirker said the Union represented a substantial majority (approximately 4,000) of the employees of the Commission and that the Union wanted to discuss "matters concerning terms and conditions of employment" of the employees of the Commission represented by the Union. (A. 32). Kirker wanted a collective bargaining agreement between the Union and the Commission. (A. 138). Commissioner Ritchie advised Kirker that he had just become Road Commissioner and desired time to consider the matter more fully; that the Commission at year end 1968 had 7,445 hourly and salaried non civil service employees and 366 civil service employees; that his office spent several hundred millions of dollars a year in constructing and maintaining state and federal-state highways; that the Legislature of West Virginia was in its biannual 60-day session and as Commissioner he faced many problems in addition to those presented by Kirker. (A. 138)

Shortly after February 6, 1969, Commissioner Ritchie met with Governor Moore, told him of his meeting with Kirker and gave the Governor a copy of the proposed collective bargaining agreement which Kirker wanted the Commissioner to execute. (A. 139) Governor Moore advised Commissioner Ritchie that he believed any public employee had the right to join a union, but that the collective bargaining demands of Kirker raised policy and legal questions which should be considered with care since road employees performed an essential public service and the question of collective bargaining was one of first impression in his position as Governor as well as in Ritchie's position as Commissioner. (A. 130)

By letter to Commissioner Ritchie dated February 10, 1969, Kirker wrote that there were wide spread reports

that large scale replacements in Road Commission personnel would be made by Monday, February 17; that Governor Moore had assured State Road employees that no employee who performed his job need fear Arch Moore no matter what his politics and further stated that he thought it was a shame that anyone should be forced to live in fear of his job because of the way he votes; that notwithstanding Governor Moore's statements such "fear" still persisted; and that he would appreciate advice "whether there is any basis for these fears." (A. 33) Commissioner Ritchie advised Kirker that there was no intention of making large scale replacements of State Road employees and that there was no basis in fact for the "fears" which Kirker expressed in his letter. (A. 138)

On February 11, 1969, while Commissioner Ritchie and Governor Moore had Kirker's demands under consideration, House Bill 883 was introduced in the House of Delegates. On a later day Senate Bill 353, an identical bill, was introduced in the State Senate. (A. 80) These bills were caused to be prepared and introduced by the AFL-CIO. If enacted into law, each would have: (1) authorized employees of the State to organize and bargain collectively; (2) imposed on the State a corresponding duty to bargain with union representatives; (3) given public employees the right to strike; and (4) required the State to check off for the union dues and payments to the union as the employee might authorize. (A. 131 and R. 301)

House Bill 883 and Senate Bill 353 were under consideration by the West Virginia Legislature until its adjournment on March 8, 1969. (A. 131)

House Bill 883 contained proposed legislation in the private labor-management relations sector as well as in the public sector. The House Judiciary Committee reported to the House of Delegates a Committee Substitute for House Bill 883 which retained the provisions as introduced regarding the private sector but which removed the provisions relating to the public sector. Delegate Jones, a Republican from Kanawha County, offered amendments on the floor of the house which would have restored provisions authorizing collective bargaining by public employees. The proposed amendments were defeated on a roll call vote in the House of Delegates on March 5, 1969. (A. 132 and R. 346)

Kirker and Commissioner Ritchie talked on two or three occasions after February 10, 1969, and prior to the beginning of the strike on March 3, 1969. On each occasion Kirker was told his demands were still under study. On February 26, 1969, Kirker told Commissioner Ritchie "a walkout might be imminent" and Commissioner Ritchie told Kirker he had discussed the matter with Governor Moore and that "he would be in further contact with affiant (Kirker) in a few days." (A. 33, 34) At no time did Commissioner Ritchie refuse to talk to Kirker, and it was the Commissioner's consistent position with Kirker before the strike that no decision had been reached as to whether the State would bargain collectively with Kirker and the Union. (A. 138, 139)

Governor Moore was in doubt that the State, absent legislation, could properly enter into collective bargaining negotiations with a union claiming to represent State employees. Moreover, Governor Moore believed that while the Legislature had the subject of collective bargaining by public employees under consideration, it

would have been violative of the concept of separation of powers for the executive branch to have entered into collective bargaining negotiations with Kirker. (A. 133)

On Sunday, March 2, 1969, Kirker publicly announced that a state-wide strike of Commission employees who were members of the Union would begin on March 3. (A. 139) Petitioner-Employees and other union members struck on March 3. Mass picketing and, in some cases, threats of violence were employed by the Union and Petitioner-Employees to bring road maintenance in many areas of the State's fifty-five counties to a complete stop. When reporters for the news media told Kirker on March 3 that snow was expected in some areas of the State that night, he replied, "Well, that's too bad." (A. 139, 140) The strike and picketing shut down maintenance operations of the Commission in additional areas of the State on March 4; damage to State property by strikers was reported as were incidents of obstructing entrances to Commission facilities; and pickets in force caused work to stop on a new $15 million State office building in Charleston and on new road construction. Commissioner Ritchie on March 4 issued a public plea to Commission personnel to return to work because it was "vital that services provided by the State Road Commission to the people of West Virginia be continued without interruption." (A. 140) Kirker told the communication media on March 4 that Commission personnel in 7 of the 10 Districts were "out solid," namely Districts 1, 2, 3, 4, 6, 8, and 10, and that a majority of men in Districts 5 and 7 were out. The object of the strike was "job security, seniority and a grievance procedure," Kirker said. (A. 140, 150)

On March 5, Commissioner Ritchie was entering his office building and met Kirker who asked the Commissioner if he were ready to talk. Commissioner Ritchie invited Kirker to his office. Kirker declined. (A. 140)

Beginning in the afternoon of March 6, serious and dangerous road conditions due to accumulations of snow began to develop. Pleas to return to work by the Commissioner were communicated throughout the State by all communication media. On March 6 and 7, several important roads were not passable, schools were closed, and personal injuries and property damage resulted from lack of maintenance of State highways. (A. 141, 142, 151-157)

The Commissioner again publicly appealed to the strikers to return to work on March 8. (A. 142)

On March 10, fresh snow fell over much of West Virginia, closing roads and schools and causing many accidents and resulting in property damage and personal injuries. (A. 142, 158-166)

Because warming, followed by colder weather and fresh snow had made State roads more hazardous by the morning of March 11, and the strikers, generally, had failed to return to work, Commissioner Ritchie had concluded and so advised Governor Moore at 10:00 a.m. that the public interest required that Commission employees still actively participating in the strike be discharged and replaced. Governor Moore had reached the same conclusion. Both agreed the action to be taken was most serious and that it should be announced by the Governor. (A. 77, 134, 135, 142, 143) An aide was directed to prepare a statement and to call a press conference for 12:00 noon. Governor Moore's complete state-

ment to the media with Commissioner Ritchie by his side (A. 83-91) announced the discharge of the strikers because their refusal to work could no longer be tolerated if the State was to clear highways of ice and snow to protect the health, safety and welfare of the State's citizens. (A. 83-84) Governor Moore made it clear that the implementation of the order and the decision in each individual case were the administrative responsibility of Commissioner Ritchie. (A. 88) The Commission either did not separate from employment, or promptly reinstated, all Commission employees who were not working on March 11, but who were not actively participating in the strike. In all, 1,752 persons, out of 3,843 which the Union claimed to represent were discharged and had not been reinstated as of May 1, 1969. (A. 143, 144) These 1,752 persons were discharged for striking against the State, and for no other reason. (A. 136, 137, 144, 145)

Petitioners do not deny Petitioner-Employees were on strike but argue that the real purpose of Governor Moore was to discharge Democrats in order to implement the "spoils system" and filed in the record an affidavit from Cecil H. Underwood to the effect that Governor Moore in a speech to a Republican "Lincoln Day Dinner" in Parsons, West Virginia, on April 13, 1968, before Moore had been nominated for Governor, said that if he were elected he wanted to "clean 'em out [Democrats] from top to bottom." (A. 122, 123)

The lack of any partisan political motive, if relevant, in terminating the employment of the strikers is established not only by affidavits of Governor Moore (A. 129) and Commissioner Ritchie (A. 137), but by the fact that Governor Moore at the very beginning of his administration appointed Democrats to head major de-

partments in the executive branch of State government, (A. 136), and by the admission of the Union, for purposes other than this litigation, that of approximately 3,400 strikers, approximately 1,400 returned to their jobs and that "there are now (June 3, 1969) approximately 2,000 still on strike." (A. 135, 136)

So far as the record discloses, none of the Petitioner-Employees requested an administrative hearing.

This action was instituted March 21, 1969.

Even after the institution of this litigation Kirker, Union and Petitioner-Employees have caused picketing of Road Commission offices, garage and installations to continue and Union and their AFL-CIO affiliates have attempted to encourage AFL-CIO members throughout the nation to engage in a "tourist boycott" of West Virginia. (A. 121, 122, 145)

None of those discharged were covered by West Virginia Civil Service Laws, either because their positions were excepted from coverage by statute or because affirmative action by the Governor, the Civil Service Commission and the appointing authority necessary to add the positions to the classified service had not been taken. (A. 144, P. Br. 7)

There is no basis in this record for several factual allegations asserted *arguendo* by Petitioners:

1. The statement that certain discharged employees had not in fact actively participated in the strike or were absent from work on March 11, 1969 for unrelated reasons (P. Br. 14, para 1) has no foundation in the record.

2. The statement that the mass discharge was improperly motivated by the desire to create patronage jobs

for the Governor's political allies (P. Br. 14, para 2) is contrary to the undisputed facts of the record, unless the statement allegedly made by Governor Moore before he was nominated creates such an issue.

3. The statement that the discharges were in retaliation for the employees having joined a union (P. Br. 14, para 3) is contrary to the undisputed facts of the record.

4. The statement that since there are no West Virginia statutes, court decisions or Commission regulations declaring strikes by state employees to be unlawful, the employees were not subject to being discharged for participating in the strike fails to give recognition to (a) the provisions of the West Virginia Constitution making the common law the law of West Virginia;[3] (b) fails to recognize the admitted knowledge of Kirker and his union that public employees do not have the legal right to strike in West Virginia and that strikes may result in dismissal from employment (A. 44, A. 62, A. 99) and (c) fails to recognize the law as set forth in the opinions of West Virginia Attorneys General placed in the record in this case by Petitioners themselves (A. 102-115).

The Proceedings in the District Court

Following the discharge of road maintenance workers striking against the State, on March 11, 1969, Kirker and the other petitioners on March 21, 1969 (not March 29) (A.2) instituted this action against Respondent Moore as Governor and individually, Respondent Ritchie as State Road Commissioner and individually, Respondent the State Road Commission of West Virginia, a cor-

[3]W. Va. Const. Art. VIII. § 21 (p. 1a, *infra*); see also W. Va. *Code*, ch. 2, art. 1, § 1 (Michie 1966) (p. 3a, *infra*).

porate agency of the State, and Respondent Riffle, as Cabell County Supervisor of the maintenance force of the Road Commission and individually. (A. 8).

The Complaint, grounded on the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleged the discharge of Petitioner-Employees and others similarly situated because of "union activity" (A. 9) as well as other grounds referred to in the Petition.

The relief sought by the Complaint includes: judgment against Governor Moore in his official capacity and individually, and the Commission, jointly and severally, for loss of income from March 11, 1969 to date of judgment; a mandatory injunction requiring Commissioner Ritchie to meet with Kirker, as the representative of Petitioner-Employees, to seek to redress grievances; exemplary damages against all defendants, jointly and severally in an amount of $250,000.00; reasonable attorney fees and costs; an order setting aside the dismissal of Petitioner-Employees and an injunction prohibiting discrimination against employees or applicants for employment of the Commission on the basis of political or union "affiliation or activity". (A. 11, 12)

Respondents filed notice of motions and motions to dismiss; Petitioners filed a motion for a preliminary injunction and a motion for determination that the action was maintainable as a class action; Petitioners and Respondents each served on opposing counsel and filed affidavits, the affidavits of Governor Moore and Commissioner Ritchie being served on Petitioners on July 14, 1969 and ordered filed as of that date (A. 128, 129).

All motions were brought on for hearing on August 19, 1969 (P. Br. A. 5a), at which time Petitioners filed an additional affidavit (A. 122) and Respondents filed a

memorandum from Kirker, dated July 7, 1969, addressed to "The Striking State Road Commission Employees".

As is demonstrated in the Opinion of the District Court (P. Br. A. 3a-20a), the Supplemental Opinion (P. Br. A. 21a-25a) the letter from the District Judge to Counsel dated August 25, 1971 (A. 221) and the *nunc pro tunc* order as of July 13, 1969, approved for entry by Counsel for Petitioners (A. 128), it was quite clear that the Court intended to consider the proof offered by Petitioners and Respondents in passing on Respondents' motions to dismiss, argued and submitted on August 19, 1971.

On August 21, 1969, Petitioners filed a motion for the production of documents which was brought on for hearing on September 12, 1969, and affidavits by Governor Moore (A. 219), Commissioner Ritchie (A. 213) and Respondent Riffle (A. 212) were filed in opposition to the motion. The motion was denied for the reasons stated by the District Court in its Supplemental Opinion (P. Br. A. 21a, 23a).

Restatement of Questions Presented

This case arose out of the summary discharge by the Governor and State Road Commissioner of West Virginia of Petitioner-employees and other striking road maintenance employees of the State on the basis of a "record demonstrating without contradiction that the plaintiffs (Petitioners) had refused to perform their duties under conditions of extreme peril to users of the state's highways." (quoted language from the *Per Curiam* opinion of the Court of Appeals, P. Br. A. 1a).

1. With respect to the Petitioners' statement of first question, in Respondents' reading of the record the ques-

tion is whether the discharged Petitioner-Employees were entitled to a "pre-termination" administrative hearing, since the record contains no evidence that a post-termination hearing was requested.

2. With respect to Petitioners' description of the second question presented, Respondents do not believe that there is in the record any evidence sufficient to establish a genuine issue of material fact regarding the motivation for the discharges.

If certiorari is granted, this case raises the following additional questions for review:

3. Whether the Eleventh Amendment constitutes a defense to the maintenance of this action.

4. Whether the State Road Commission of West Virginia, the Governor of West Virginia and the State Road Commissioner of West Virginia, in their official capacities, are "persons" within the meaning of that term in 42 U.S.C. § 1983.

5. Whether Respondent Arch A. Moore, Jr., as an individual and William Ritchie, as an individual, are immune from the money and damage claims in this action.

ARGUMENT

Petitioners advance no sound reason for granting the writ. (P. Br. 11 *et seq.*)

I. The decision below does not conflict with any decision of this Court requiring a hearing in connection with terminating public employment.

A. The cases, expounding what is often described as the "unconstitutional conditions doctrine" (P.Br. 11, 12), (which Petitioners say is best represented by *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551 (1956), which voided a New York statute which automatically termi-

nated the public employment of one who invoked the Fifth Amendment privilege against self incrmination), are inapposite. This is not a case of public employees being discharged for exercising constitutional rights, unless the Court were to hold that public employees have a constitutional right to strike.

B. The line of cases, represented by *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), imposing due process requirements where the state attaches a "badge of infamy" to a citizen is not relevant to the facts in this case. Striking, both in the private and public sector, has become so commonplace in American society that a discharge for that reason cannot be equated with a badge of infamy.

Goldberg v. *Kelly*, 397 U.S. 254 (1970) is inapposite because it is an extension of a principle previously enunciated by the Court that when the legislature has seen fit to limit the grounds for denying, reducing or terminating certain benefits, the administering agency must observe certain minimal procedural standards to test whether facts warranting the action existed. The majority in *Goldberg* v. *Kelly, supra*, recognized that constitutional claims to procedural due process are not absolute, citing the exception recognized in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961).[4]

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[4]After quoting from a portion of the opinion in that case and stating in *Goldberg* at 397 U.S. 263 that, "It is true, of course, that some government benefits may be terminated without affording the recipient a pretermination evidentiary hearing," the majority in footnote 10 cited supporting cases and said, in part:

"In *Cafeteria & Restaurant Workers Union* v. *McElroy*, supra, at 896, 6 L Ed 2d at 1237, summary dismissal of a public employee was upheld because '[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control,' and because the case involved the Government's 'dispatch of its own internal affairs.' *Cf. Perkins* v. *Lukens Steel Co.*, 310 US 113, 84 L Ed 1108, 60 S Ct 869 (1940)."

The majority of one in *Goldberg* required a pretermination hearing, in part, because of humanitarian concern about the ability of the average welfare recipient to live, and the fear that the terminated welfare recipient would not be able "to seek redress from the welfare bureaucracy". *Id.* at 264. There is no evidentiary support in this record to support such a rationale.[5]

The facts in *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* were that a short-order cook in a cafeteria operated on the premises of a Navy ordnance installation had been refused permission to enter the premises on the ground that she was a "security risk." The employee had been employed for six years by her employer, the M & M Restaurant, Inc. and her work record was entirely satisfactory. The union representing the employee requesfed a hearing before officials of the installation. This request was denied and an action was commenced in the United States District Court to compel the return to the short-order cook of her identification badge. The petitioners claimed that due process required that the exployee be advised of the specific grounds for her exclusion and that she be awarded a hearing at which she might refute

[5]It should be noted that the language relied on by Petitioner from *Ricucci* v. *U.S.* 425 F.2d 1252 (Ct. Cl. 1970) equating the legal and economic hardship of a terminated welfare beneficiary with a discharged government employee was concurred in by only two of seven Judges. More cogent is the District Court opinion in *Herriges* v. *U.S.*, 314 F. Supp. 1352 (D. Mont. 1970), which points out that in terms of the ability of government to function, nothing depends on "John Kelly and his fellow welfare recipients," but on governmental employees rests the ability of government to function. The Court added:

> "I am not tempted, using the decision in *Goldberg* as a springboard, to discover new due process rights which would undercut long established administrative procedures. The recent discovery by public employees of all levels of government that under our general system of due process, laws cannot be enforced against mass violators of law and that the no strike law applicable to government employees and injunctions issued under them can be violated almost with impunity has immeasurably increased the burdens of the executive department. It ill behooves the judiciary at this time in our history to add to those burdens by the enlargement of due process concepts." 314 F. Supp. 1352, 1355.

them. The United States Supreme Court flatly rejected this contention and held that such a procedure was not constitutionally required.

The government function involved here—maintaining state highways and, in the instant case, clearing them of snow and ice—is vital to safe transportation, to commerce, to the operation of schools and to the functioning of state and local government. Maintenance of highways is purely a matter of internal state responsibility. The federal government provides aid in the construction of some highways, but not in their maintenance. States have traditionally exercised "unfettered control" in the employment, control and termination of its employees, engaged in such purely internal affairs, and *Cafeteria & Restaurant Workers Union, supra,* is controlling. *Cf. Jenson* v. *Olson,* 353 F.2d 825, 828 (8th Cir. 1965).

Petitioners urge that since there is no West Virginia statute or court decision declaring strikes by public employees to be unlawful they could not be discharged for participation in a strike.

There is, of course, no federal right for public employees to strike, unless the state or public body is an employer under the Railway Labor Act.[6]

While it is true that there are no reported West Virginia court decisions declaring strikes by public employees to be unlawful and there are no West Virginia statutes so providing, the common law is the law of West Virginia unless changed by statute,[7] and Petition-

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[6]Congress has created a federal right to strike, but only in the case of Railway employees (Railway Labor Act, 45 U.S.C. § 151 *et seq*) and in the private sector of employment (Labor Management Relations Act, 29 U.S.C. § 152 (2) (3)).

[7]W. Va. *Const.*, Art. VIII, § 21 (p. 1a, *infra*); W. Va. *Code*, ch. 2, art. 1, § 1 (Michie 1966) (p. 3a., *infra*).

ers themselves have placed in the record evidence showing that it is the opinion of West Virginia Attorneys General that strikes by public employees are unlawful in this jurisdiction, (A. 102-115) and evidence showing that Kirker and his union have acknowledged in agreements made with public bodies that public employees do not have the legal right to strike in West Virginia and that strikes may result in dismissal from employment (A. 44, 62, 99)

The District Court collected and analyzed the law and concluded that strikes by public employees in West Virginia are illegal and that under the circumstances existing on March 11, 1969 "the Governor and the State Road Commissioner had the right, if not indeed the responsibility, to terminate the plaintiff's employment with the State." We can add nothing to the able exposition of the law by the District Court, which is adopted by reference (P.Br. A. 3a, 12a-16a).

C. Petitioners' argument that their exclusion from coverage under West Virginia's Civil Service System deprives them of equal protection of the laws is completely without merit and if it had merit the court would invalidate the statute, rather than legislate Petitioner-Employees within its coverage.

There is certainly nothing remarkable in the fact that the West Virginia Legislature, in enacting the state civil service law, chose to make eligible for coverage thereunder only a portion of state employees to whom it might ultimately be desirable and practical to afford such coverage. Gradualism has been the key to the approach followed under the federal civil service law, under which the President has been authorized to bring employees, by executive order, under the Act, *United*

States v. *Wickersham*, 201 U.S. 390 (1906), and also under numerous state civil service acts. See, *e.g.*, *Schmitt* v. *Hunt*, 359 P.2d 198 (Okla. 1960).

Additionally, the fact that reforms of many kinds may be brought about gradually without violating the Equal Protection Clause has been recognized in numerous decisions. For example, in *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955), an Oklahoma statute regulating visual care was attacked on the ground, *inter alia*, that it constituted invidious discrimination and hence violated the Equal Protection Clause. In upholding the statute, the Court stated:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies * * * [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Accord, *American Federation of Labor* v. *American Sash & Door Co.*, 335 U.S. 538, 541 (1949).

Although not cited by the Petitioners, the equal protection argument has been raised unsuccessfully with respect to exemptions from civil service statutes in other cases, including *Ricks* v. *Department of State Civil Service*, 200 La. 341, 8 So.2d 49, 55, 56 (1942); *State ex rel., McKittrick* v. *Kirby*, 349 Mo. 988, 163 S.W. 2d 990, 994 (1942); and *Shelby* v. *City of Pensacola*, 112 Fla., 584, 151 So. 53, 55 (1933).

II. Petitioners contend certiorari should be granted because of an alleged conflict among the circuits regarding the necessity of a hearing where non-tenured teachers are dismissed or their contracts are not renewed

(P. Br. 16, 17). These cases are inapposite, involving as they do public employees in the teaching area where this Court has recognized a unique danger to First Amendment freedoms. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), overruling *Adler* v. *Board of Education*, 342 U.S. 485 (1952). Moreover, the cases alleged to be in conflict do not involve a strike or refusal to work, nor do they involve employees rendering essential services necessary for government to function.

III. It is contended that there was a "genuine factual issue regarding the true motivation of the discharges" (P. Br. 18). When the President or the Chief Executive of a state, charged by the federal or a state constitution to see to the faithful execution of the laws, takes action within the perimeter of his power for an asserted proper purpose, clearly warranted by the facts and the law, Respondents cannot conceive that he will be subjected to the harrassment of discovery proceedings and a trial because it is claimed he acted from some ulterior motive. Petitioners cite no judicial precedent for their novel theory. But even if the theory were sound we submit there is no relevant evidence in the record creating an issue of material fact.

IV. Petitioners' urge certiorari because of "the substantial number of employees who were adversely affected," (P. Br. 19) adding that the questions raised are of interest to "literally millions," of public employees. The fact that there were so many strikers would have made pre-termination hearings impossible unless the roads of West Virginia were to go without maintenance. Post-termination hearings were never requested by Petioners. Instead they immediately instituted this action.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 24, 1971

APPENDICES

STATUTORY APPENDIX

CONSTITUTION OF THE STATE OF WEST VIRGINIA

* * *

ARTICLE VII, § 5.

Chief Executive—Powers

The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

* * *

ARTICLE VII, § 18.

Executive Heads to Make Reports

The subordinate officers of the executive department and the officers of all the public institutions of the State, shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such report to the legislature; and the governor may at any time require information in writing, under oath, from the officers of his department, and all officers and managers of State institutions, upon any subject relating to the condition, management and expenses of their respective offices.

* * *

ARTICLE VIII, § 21.

Parts of Common Law Effective

Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature. All civil and criminal suits and proceedings pending in the former circuit courts of this State, shall remain and be proceeded in before the circuit courts of the counties in which they were pending.

* * *

UNITED STATES CODE

* * *

29 U.S.C. § 152.

Definitions

When used in this subchapter—

* * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

WEST VIRGINIA CODE

* * *

§ 2-1-1.

Common law.

The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State.

* * *

§ 6-7-2a.

Terms of certain appointive state officers; appointment; qualifications; powers and salaries of such officers.

Notwithstanding any other provision of this Code to the contrary, on and after the effective date of this section [January 21, 1969] each of the following named appointive state officers shall be appointed by the governor, by and with the advice and consent of the senate. Each of such appointive state officers shall serve at the will and pleasure of the governor and until the respective state officer's successors have been appointed and qualified. Each of such appointive state officers shall hereafter be subject to the existing qualifications for holding each such respective office and each shall have and is hereby granted all of the powers and authority and shall perform all of the functions and services heretofore vested in and performed by virtue of existing law respecting each such office. The annual salary of each such named appointive state officer shall be as follows:

The state road commissioner, thirty thousand dollars;

* * *

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SEP 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-138

LYLE KIRKER, ET AL., *Petitioners*,

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents*.

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 24 (5) of this Court, petitioners herewith file this Supplemental Brief in support of the petition for writ of certiorari filed herein.

Recent Action by This Court Militates in Favor of the Granting of the Instant Petition

During the pendency of the petition herein, this Court took action in three cases which demonstrates either that the decision of the court of appeals challenged herein is erroneous or at the very least that the questions presented herein are certworthy.

First, in *Bell* v. *Burson,* 402 U.S. 535 (1971), this Court held that the Georgia Motor Vehicle Responsibility Act denied due process of law to uninsured motorists involved in automobile accidents by requir-

ing the suspension of their driver's licenses without providing a hearing to determine "whether there is a reasonable possibility of a judgment being rendered against [them] as a result of the accident." *Id.* at 542.

Using the impact of the summary revocation of a driver's license as a springboard, this Court elaborated in *Bell* upon the function to be played by the due process clause in connection with the withdrawal of other public benefits or privileges such as welfare, public employment and unemployment compensation:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956) (*discharge from public employment*); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (denial of a tax exemption); *Goldberg* v. *Kelly*, *supra* (withdrawal of welfare benefits). See also *Londoner* v. *Denver*, 210 U.S. 373, 385-386 (1908); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941). [Emphasis added] [402 U.S. 535, 539].

In addition to citing *Slochower, supra,* in *Bell* for the proposition that public employees are entitled to

the protections of the Fourteenth Amendment in connection with their discharge, this Court reaffirmed *Slochower* in *Connell* v. *Higginbotham,* 403 U.S. 207 (1971), in the process of striking down as unconstitutional a loyalty oath required as a condition of employment for all public employees in the State of Florida. This Court held that the portion of the oath which required public employees to swear or affirm that they did "not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" fell "within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process" (citing *Slochower*) (403 U.S. 207, 208-9).

Finally, this Court granted the petition for writ of certiorari in *Perry* v. *Sindermann,* 403 U.S. 917 (1971) (No. 952, 1970 Term; renumbered No. 70-36, 1971 Term), in which the Fifth Circuit held that a non-tenured public school teacher was entitled to a hearing as to whether the non-renewal of his teaching contract was "really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong" and that such a hearing must be "before an impartial tribunal which must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition" [*Sindermann* v. *Perry,* 430 F. 2d 939, 944 (5th Cir. 1970)].

As the petition herein indicates (pp. 16-7), a substantial conflict exists among the circuits as well as the state courts regarding the foregoing question. Indeed, several petitions are now pending in this Court raising identical or closely related issues concerning the due process rights of teachers and other public employees.

See *Hodgin* v. *Noland,* 435 F. 2d 859 (4th Cir. 1970), *petition for cert. filed* (April 30, 1971) (No. 1657, 1970 Term; renumbered No. 70-141, 1971 Term); *Fooden* v. *Board of Governors,* — Ill. — (1971), *petition for cert. filed* (June 29, 1971) (No. 1901, 1970 Term; renumbered No. 70-354, 1971 Term); *Roth* v. *Board of Regents,* — F. 2d — (7th Cir. 1971), *petition for cert. filed* (August 3, 1971) (No. 71-162, 1971 Term); *Orr* v. *Trinter,* — F. 2d — (6th Cir. 1971), *petition for cert. filed* (August 18, 1971) (No. 71-249, 1971 Term).

Petitioners submit that since the closely related questions presented herein and in *Perry, supra,* involve the interests and constitutional rights of more than 13 million public employees in the United States,[1] the instant petition should be granted and this case should be heard simultaneously with *Perry, supra,* so that the highly significant issues involved may be considered by this Court against the broadest possible factual matrix.

CONCLUSION

For the additional reasons stated herein, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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[1] U. S. Bureau of Labor Statistics, Dep't of Labor, 18 Employment and Earnings 57 (July 1971).